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No. 04-1148

In the Supreme Court of the United States

VLADIMIR RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, under the plain-error rule, Fed. R. Crim. P. 52(b), a defendant who was sentenced under a mandatory application of the Sentencing Guidelines and who did not preserve an objection to factfinding by the court, must, in order to show that the error had an effect on his substantial rights, establish that there is a reasonable probability that the district court would have imposed a lower sentence if it had treated the Guidelines as advisory under *United States* v. *Booker*, 125 S. Ct. 738 (2005).

2. Whether such a defendant, who received a sentence within the applicable Guidelines sentencing range, can meet his burden to show that the error under *Booker* seriously affected the fairness, integrity, or public reputation of judicial proceedings, as is required to obtain relief under the plain-error rule.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 398 F.3d 1291. Opinions concurring in and dissenting from the denial of rehearing en banc are reported at 2005 WL 895174.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2005. The petition for a writ of certiorari was filed on February 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to possess with intent to distribute

3,4-methylenedioxymethamphetamine (MDMA), also known as ecstasy, in violation of 21 U.S.C. 846, and possession of MDMA with the intent to distribute it, in violation of 21 U.S.C. 841 (2000 & Supp. II 2002). He was sentenced, before the decision of this Court in *United States* v. *Booker*, 125 S. Ct. 738 (2005), to 109 months of imprisonment, a sentence in the middle of the sentencing rage the court found applicable. On appeal, petitioner raised, for the first time, a claim that the imposition of his sentence violated the Sixth Amendment because the district court had found facts that raised his Guidelines sentence. Applying the plain-error rule, Fed. R. Crim. P. 52(b), the court of appeals held that, under *Booker*, there was error in the process of imposing petitioner's sentence, but that petitioner could not show that the error affected his substantial rights. Accordingly, the court of appeals affirmed.

1. Petitioner's brother, Alex Rodriguez, supplied MDMA tablets to a number of people in Tampa, Florida, including Jorge Salgado, who purchased the tablets for distribution in Tampa and elsewhere. Beginning in early 2002, petitioner transported shipments of MDMA tablets from Miami to Tampa for Salgado and other dealers. On September 5, 2002, petitioner was arrested after he delivered 2,000 MDMA tablets to Salgado, who had arranged to sell the tablets to a government informant. Pet. App. 2a-5a; Gov't C.A. Br. 2-5.

2. Petitioner was charged in a two-count superseding indictment with conspiring to possess with intent to distribute and possessing with intent to distribute "a quantity of a mixture and substance containing a detectable amount of" MDMA, in violation of 21 U.S.C. 841(a)(1) and 846. Superseding Indictment 1, 2. At trial, when Salgado was asked how many tablets, on average, were involved in each delivery from petitioner, he testified that "there were * * *

three or four thousand, five thousand, at least to me, for each trip. It could have been * * * 10 or 12 times. It could have been 25, 30,000 pills, 30, 35,000 pills; I don't know." Petitioner testified on his own behalf, denying any involvement in the drug conspiracy. Pet. App. 3a-4a, 9a; Gov't C.A. Br. 3-4.

The district court did not instruct the jury that it was required to determine the quantity of drugs involved in petitioner's offenses. The jury found petitioner guilty on both counts. Pet. App. 5a.

The presentence report (PSR) recommended that petitioner be held accountable for 30,000 tablets of MDMA, which resulted in a base offense level of 32 under the federal Sentencing Guidelines. See U.S. Sentencing Comm'n, *Guidelines Manual* (2001). It also recommended a two-level enhancement for obstruction of justice pursuant to Guidelines § 3C1.1 based on petitioner's false testimony at trial. Those calculations, with petitioner's criminal history category of I, yielded a Guidelines sentencing range of 151 to 188 months of imprisonment. Pet. App. 5a; PSR ¶¶ 25-27, 31, 70.

Petitioner did not object to the treatment of the Sentencing Guidelines as mandatory, nor did he contend that the use of judicial factfinding to raise his Guidelines sentence violated the Sixth Amendment. He did object to the PSR's drug quantity calculation, arguing that Salgado was not a credible witness and that Salgado's testimony on drug quantity was unreliable and was "impeached" by the results of a polygraph examination petitioner had taken. Petitioner contended that he should be held accountable only for the 2,000 tablets he had delivered to Salgado on September 5, 2002. Pet. App. 5a-6a.

The district court overruled petitioner's objection, noting, *inter alia*, that petitioner's claim that his involvement

in the conspiracy was limited to the delivery of 2,000 tablets was inconsistent with his trial testimony, in which he insisted that he was not involved in the drug conspiracy at all. Pet. App. 7a; see 5/10/04 Sent. Tr. 27-30. The court agreed with petitioner, however, that he was entitled to a two-level reduction under Guidelines § 3B1.2(b) because he was a minor participant in the offense. 5/10/04 Sent. Tr. 42. With that adjustment (which also reduced petitioner's base offense level to 30, see Sentencing Guidelines § 2D1.1(a)(3)), and a two-level enhancement for obstruction of justice, petitioner's Guidelines sentencing range was 97 to 121 months of imprisonment. The court imposed a prison term of 109 months. Pet. App. 7a-8a; 5/10/04 Sent. Tr. 44, 49.

3. On appeal, in reliance on *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), petitioner argued for the first time that his sentence was imposed in violation of the Sixth Amendment.[1] In *Blakely*, the Court applied the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), to invalidate a state sentence that was increased beyond the range authorized by the state's statutory sentencing guideline regime, explaining that the enhancement violated the Sixth Amendment because the facts supporting it were "neither admitted by [the defendant] nor found by a jury." 124 S. Ct. at 2537.

While petitioner's appeal was pending, this Court decided *Booker*, in which the Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal

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[1] Petitioner also argued that the district court's calculation of the drug amount was clearly erroneous. The court of appeals concluded, however, that the drug-quantity determination was "supported by a preponderance of the evidence" because, among other things, Salgado's testimony about the number of MDMA tablets involved in his transactions with petitioner was corroborated by other evidence at trial. Pet. App. 10a.

Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 756-769 (Breyer, J., for the Court).

Because petitioner had not raised a Sixth Amendment challenge to his sentence in the district court, the court of appeals reviewed petitioner's claim under the plain-error standard. Pet. App. 11a-12a; see Rule 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). To obtain relief under Rule 52(b), a defendant must show that there was error, that the error was "plain," that it "affect[ed] substantial rights," and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002) (quoting *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)).

The court of appeals concluded that the first two components of the plain-error test were satisfied: petitioner's sentence was erroneous under *Booker*, and the error was plain at the time of appeal. Pet. App. 12a-13a. The error in pre-*Booker* sentences, the court explained, is not the enhancement of the defendant's sentence based on facts not found by the jury; rather, "[t]he constitutional error is the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge" under a mandatory guidelines regime. *Id.* at 17a. Accordingly, in applying the third component of the plain-error standard to a sentencing error under *Booker*, the court "ask[s] whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case." *Ibid.*; see *id.* at 13a (standard for showing effect on substantial rights "is the familiar reasonable probability of a different result formu-

lation, which means a probability 'sufficient to undermine confidence in the outcome'") (quoting *United States* v. *Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004)). The court emphasized that the defendant has the burden to show that a forfeited error affected his substantial rights. Pet. App. 13a-15a.

On the record in this case, the court found, it was impossible to tell whether the district court would have imposed a different sentence under *Booker*'s advisory guidelines regime. Pet. App. 17a. Citing *Jones* v. *United States*, 527 U.S. 373, 394-395 (1999), the court concluded that "where the effect of an error on the result in the district court is uncertain or indeterminate * * * the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." Pet. App. 17a. Because petitioner could not meet his burden under the third component of the plain error test, the court had "no occasion to decide how he would have fared under the fourth prong." *Id.* at 17a.[2]

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[2] After the petition for a writ of certiorari was filed, the court of appeals issued an order denying rehearing en banc. *United States* v. *Rodriguez*, No. 04-12676, 2005 WL 895174 (11th Cir. Apr. 19, 2005). Judge Carnes issued an opinion concurring in the denial of rehearing en banc, further explaining why the "reasonable probability" standard accords with this Court's precedents. *Id.* at *1-*20. Judge Tjoflat dissented from the denial of rehearing en banc, arguing that "[a] *Booker* error that involves an actual Sixth Amendment violation is a structural error" that "cannot be subject to the third prong of the plain-error test." *Id.* at *21, *28. Judge Barkett also dissented; in her view, a defendant who "prove[s] that *Booker* error denied him a constitutionally-mandated process and that the outcome of that process cannot be known until the process actually takes place" has demonstrated that the error affected his substantial rights. *Id.* at *37.

DISCUSSION

Petitioner contends that this Court's review is warranted to resolve a conflict in the circuits on the proper application of the plain-error standard to forfeited claims of sentencing error under *Booker*. The court of appeals in this case correctly held that petitioner was not entitled to relief on his unpreserved *Booker* claim, and the conflict in the circuits involves a transitional issue that may have limited continuing importance once the cases in which sentences were imposed before *Booker* have become final. Nonetheless, the multi-circuit conflict on the issue is deep and real, and it implicates issues concerning the proper conduct of plain-error review that could recur in other contexts. Accordingly, this Court's review is warranted.

1. In *Booker*, the Court held that because the Sentencing Reform Act made the federal Sentencing Guidelines mandatory, a Guidelines sentence that is enhanced based on facts found by the judge violates the Sixth Amendment jury trial right. 125 S. Ct. at 748-756. To remedy the Guidelines' constitutional defect, *Booker* invalidated provisions of the Sentencing Reform Act of 1984 that made the Guidelines mandatory, 18 U.S.C. 3553(b) and 3742(e), thereby "mak[ing] the Guidelines effectively advisory." 125 S. Ct. at 757. The Court held that the Guidelines are advisory in all cases—even where they can be applied without judicial factfinding. *Id.* at 768. While *Booker*'s holdings—"both the Sixth Amendment holding and [the] remedial interpretation of the Sentencing Act"—apply to all cases on direct review, the Court made clear that not "every appeal will lead to a new sentencing hearing." *Id.* at 769. In particular, "reviewing courts [are] to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Ibid.* The

court of appeals correctly rejected petitioner's claim that he was entitled to resentencing under *Booker* on plain-error review.

a. While the first and second components of plain-error review are satisfied here, to satisfy the third component of the Rule 52(b) plain-error test, a defendant who has forfeited his claim of sentencing error must show prejudice—*i.e.*, a reasonable probability that he would have received a lower sentence under the advisory guidelines regime. Pet. App. 17a; see *United States* v. *Mares*, 402 F.3d 511, 521 (5th Cir. 2005), petition for cert. pending, No. 04-9517 (filed Mar. 31, 2005); *United States* v. *Antonakopoulos*, 399 F.3d 68, 75 (1st Cir. 2005). Contrary to petitioner's contention (Pet. 17), the court of appeals did not require him to "affirmatively demonstrate that the result *would have been* more favorable to him" under advisory guidelines. The court repeatedly made clear that the defendant's burden under the third component of the plain-error standard is to show "a reasonable probability that the result would have been different but for the error." Pet. App. 17a; see *id.* at 19a ("defendants must establish a reasonable probability that * * * the court would have imposed a lesser sentence"). The court specifically quoted (*id.* at 13a) the "familiar" formulation in *Dominguez Benitez*, 124 S. Ct. at 2340, that the probability required must be "sufficient to undermine confidence in the outcome," which, *Dominguez Benitez* made clear, does *not* require a showing by the defendant that "but for the error things would have been different." *Id.* at 2340 n.9.

Petitioner points to nothing in the record that suggests that the district court would have sentenced him more leniently if the Guidelines had been treated as advisory rather than mandatory. Although petitioner asserts (Pet. 21) that judges may now "consider a wide array of mitigat-

ing factors not previously deemed relevant under the Guidelines," at sentencing even before *Booker*, a defendant had the incentive and the legal right to bring to the court's attention all facts that are germane to punishment. See *United States* v. *Gonzalez-Huerta*, 403 F.3d 727, 735 (10th Cir. 2005) (en banc) (defendants, "even prior to *Booker*, had every reason to present mitigating sentencing factors to the district court"); Sentencing Guidelines § 1B1.4 (in determining sentence to impose within sentencing range or whether departure is warranted, "the court may consider, without limitation, any information concerning the background, character, or conduct of the defendant, unless otherwise prohibited by law"). The Guidelines do provide that a variety of factors are not "ordinarily" relevant to *departures* from the sentencing range. See, *e.g.*, Guidelines §§ 5H1.1-5H1.6. But the only factors said not to be "relevant in the determination of the sentence" at all are "race, sex, national origin, creed, religion, and socio-economic status," Guidelines § 5H1.10, and that is a result of a direction from Congress. See 28 U.S.C. 994(d).

Petitioner also suggests (Pet. 21) that his substantial rights were affected because his "sentence exceeded the maximum justified under the Guidelines by the facts found by the jury or admitted by petitioner." That argument mistakes the nature of the constitutional error that occurred in Guidelines sentences imposed before *Booker*. The error is not that the district court increased the defendant's sentence based on its own factual findings; *Booker* makes clear that such judicial factfinding under the Guidelines remains valid. See 125 S. Ct. at 750; *id.* at 764. Rather, the error is that the court was compelled to do so by a mandatory guidelines system. See Pet. App. 18a; *Mares*, 402 F.3d at 518; *Antonakopoulos*, 399 F.3d at 75-76.

b. Even if petitioner could show that the sentencing error affected his substantial rights, relief on plain-error review would not be warranted because the error does not call into question the fairness, integrity, or public reputation of the sentencing proceedings. As this Court explained in *Olano*, a prejudicial plain error does not, without more, satisfy that component of the plain-error analysis, "for otherwise, the discretion afforded by Rule 52(b) would be illusory." 507 U.S. at 737.

Petitioner's Guidelines-based sentence does not call into question the fairness, integrity, or public reputation of judicial proceedings. The Sentencing Commission formulated the Guidelines, and has continually updated them, to reflect nationwide sentencing practices—including identifying and assigning weights to the factors, both aggravating and mitigating, that judges traditionally used in determining an appropriate sentence—and to account for the sentencing objectives in 18 U.S.C. 3553(a). A sentence within the Guidelines range reflects the federal courts' collective sentencing expertise accumulated over the past two decades and, as such, is reasonable.

Although *Booker* increases a judge's sentencing discretion, a judge retained discretion, even when the Guidelines were treated as mandatory, to impose a sentence above or below the Guidelines sentencing range if the case contained features that took it out of the "heartland" of offenses covered by the guideline in question. See 18 U.S.C. 3553(b); *Koon* v. *United States*, 518 U.S. 81, 92-96 (1996). Petitioner did not move for a downward departure, and he has identified no factors that would justify giving him a lower sentence than the one he received under the Guidelines. The effect of the error in this case, then, is that petitioner lost the opportunity to try to convince the district court that some other, lesser sentence also would be reasonable and

should be imposed. That deprivation of an incremental degree of judicial discretion does not constitute the type of "egregious" error, *United States* v. *Young*, 470 U.S. 1, 15 (1985), that seriously jeopardizes the integrity of the sentencing proceedings.

2. As petitioner points out (Pet. 8-12), the courts of appeals have reached conflicting conclusions about the proper application of the plain-error standard to claims of sentencing error under *Booker* that are raised for the first time on appeal. All of the courts have agreed that the first two components of the plain-error test are satisfied: sentences imposed under a mandatory Sentencing Guidelines regime are erroneous under *Booker*, and the error is now "plain." The courts have adopted different approaches, however, in determining whether the third and fourth components of the plain-error test are satisfied.

Like the Eleventh Circuit, the First, Fifth, and Eighth Circuits have held that to establish that a *Booker* error affected substantial rights under the third component of the plain-error standard, the defendant must show a reasonable probability that he would have received a lower sentence under an advisory guidelines regime.[3] See *Antonakopoulos*, 399 F.3d at 78-79; *Mares*, 402 F.3d at 521; *United States* v. *Pirani*, No. 03-2871, 2005 WL 1039976, at *5-*7 (8th Cir. Apr. 29, 2005) (en banc). Those circuits have ap-

[3] The First Circuit has applied the "affecting substantial rights" prong of the plain-error test less stringently than other courts, however, and has permitted defendants to proffer evidence not in the record that they contend might have influenced the district court's exercise of discretion under advisory guidelines. See *United States* v. *Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005) (court is "inclined not to be overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines").

plied the reasonable-probability standard both in cases involving constitutional error (*i.e.*, those in which the defendant's sentence was increased based on a fact, other than a prior conviction, that was not found by the jury or admitted by the defendant) and in cases involving only statutory error (*i.e.*, those in which the only error was that the sentence was imposed under mandatory, rather than advisory, guidelines). See *Rodriguez*, 2005 WL 895174, at *1 (Carnes, J., concurring in denial of rehearing en banc) ("Because the effect of *Booker* error is the same regardless of the type, our decisions make no functional distinction between constitutional and statutory error."). Accordingly, those courts have examined the record in each case to determine whether the defendant has met his burden.[4]

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[4] Petitioner asserts (Pet. 9) that basing the "affecting substantial rights" inquiry on an examination of the record "amounts to a virtual per se rule against resentencing in the case of *Booker* error" because "affirmative evidence of what the district court would have done if it had predicted that the Guidelines would be treated as advisory will almost never exist." Subsequent decisions from the First, Fifth, Eighth, and Eleventh Circuits demonstrate, however, that the approach of those courts is not a "virtual per se rule against resentencing." See, *e.g.*, *United States* v. *Rodriguez-Ceballos*, No. 04-3390 (8th Cir. May 16, 2005), slip op. 7 (vacating sentence where "the district court consistently expressed its belief that the Guidelines range resulted in a disproportionate sentence"); *United States* v. *Pennell*, No. 03-50926, 2005 WL 1030123, at *5 (5th Cir. May 4, 2005) (vacating sentence after holding that defendant had carried burden of showing, in light of district court's statements, that the district court "would have arrived at a lesser sentence" if it was at liberty to do so); *United States* v. *MacKinnon*, 401 F.3d 8, 11 (1st Cir. 2005) (vacating sentence where district court stated sentence required by Guidelines was "unjust, excessive, and obscene"); *United States* v. *Shelton*, 400 F.3d 1325, 1332 (11th Cir. 2005) (vacating sentence where district court "expressed several times its view that the sentence required by the Guidelines was too severe"); see also *United States* v. *Valenzuela-Quevedo*, No. 03-

Some decisions of those courts have suggested that if the defendant satisfies his burden to show a reasonable probability that he would have received a lower sentence under advisory guidelines, the fourth prong of the plain-error test is also satisfied. See *United States* v. *Shelton*, 400 F.3d 1325, 1333-1334 (11th Cir. 2005) (where district court "indicated an express desire to impose a sentence lesser than the low end of the Guidelines range," defendant carried his burden to establish third and fourth prongs of plain-error test); *Antonakopoulos*, 399 F.3d at 81 (even where district judge was silent at sentencing, remand will be warranted where court of appeals concludes "that the sentence would, with reasonable probability, have been different such that both the third and fourth prongs have been met"); but see *United States* v. *Pirani*, No. 03-2871, 2005 WL 1039976, at *7 (8th Cir. Apr. 29, 2005) ("[W]e do not foreclose the possibility that there may be plain *Booker* errors that meet the third *Olano* factor but not the fourth.").

The District of Columbia, Second, and Seventh Circuits have taken a different approach. While those courts have applied plain-error analysis in the same way to claims of constitutional and non-constitutional *Booker* error, those courts have held, in considering whether the error affected substantial rights, that pre-*Booker* cases should generally

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41754, 2005 WL 941353, at *4 (5th Cir. Apr. 25, 2005) (affirming sentence where district court "explicitly stated that Valenzuela-Quevedo had not learned from his prior mistakes," "discussed with disapproval Valenzuela-Quevedo's criminal record," and "evinced approval of the applicability of the career offender designation in this case"); *United States* v. *Carpenter*, 403 F.3d 9, 14 (1st Cir. 2005) (affirming sentence where district court stated at sentencing that defendant was "a danger to the community" and court imposed "the longest sentence I can give him for the protection of society").

be remanded to the district court for the court to determine whether it would have imposed a "materially different" sentence under advisory guidelines; if so, the defendant will be entitled to resentencing.[5] *United States* v. *Crosby*, 397 F.3d 103, 116-120 (2d Cir. 2005); see *United States* v. *Coles*, 403 F.3d 764, 769-771 (D.C. Cir. 2005) (per curiam); *United States* v. *Paladino*, 401 F.3d 471, 481-485 (7th Cir. 2005). Those courts have concluded that where "the record * * * is not sufficient for an appellate court to determine prejudice with any confidence, * * * the 'only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge.'" *Coles*, 403 F.3d at 769-770 (quoting *Paladino*, 401 F.3d at 483). Different procedures have been adopted in applying the "limited remand" approach to plain error. The D.C. and Seventh Circuits retain jurisdiction while the case is remanded, and the appellate court vacates the defendant's sentence "upon being notified by the judge that he would not have imposed it had he known that the guidelines were merely advisory." *Coles*, 403 F.3d at 770-771 (quoting *Paladino*, 401 F.3d at 484). The Second Circuit has provided that the district court itself should vacate the original sentence if it determines on

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[5] Neither Rule 52(b) nor this Court's plain error decisions authorize a remand for development of the record with respect to whether the error affected substantial rights. Assessing prejudice is the job of the reviewing court, see *Dominguez Benitez*, 124 S. Ct. at 2340 ("A defendant must * * * satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.") (internal quotation marks omitted), and the prejudice determination must be made on the basis of the "existing record," *United States* v. *Vonn*, 535 U.S. 55, 74 (2002).

remand that resentencing is warranted. See *Crosby*, 397 F.3d at 120.[6]

The Third, Fourth, and Sixth Circuits have drawn a distinction between the plain-error analysis that applies to cases that involve constitutional error and the analysis that applies to cases that involve only statutory *Booker* error. Where the district court's treatment of the Guidelines as mandatory violated the Sixth Amendment, those courts have held that imposition of a Guidelines sentence based on facts found by the district court affects substantial rights and infringes upon the fairness, integrity, and public reputation of judicial proceedings. See *United States* v. *Davis*, No. 02-4521, 2005 WL 976941, at * 1 (3d Cir. Apr. 28, 2005) (en banc); *United States* v. *Hughes*, 401 F.3d 540, 548-556 (4th Cir. 2005); *United States* v. *Oliver*, 397 F.3d 369, 379-381 (6th Cir. 2005).[7] Those decisions have reasoned that "the prejudice inquiry in the case of a Sixth Amendment violation * * * is whether the district court could have imposed the sentence it did without exceeding the relevant Sixth Amendment limitation," *Hughes*, 401 F.3d at 550-551, and that to let stand a "more severe sentence than is supported by the jury verdict would diminish the integrity and public reputation of the judicial system and also would diminish the fairness of the criminal sentencing system." *Oliver*, 397 F.3d at 380 (internal quotation marks omitted). Accordingly, those courts have remanded for resentencing

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[6] Although the Fifth Circuit has not generally adopted the "limited remand" approach, see *Mares*, *supra*, the Fifth Circuit in a recent decision left open the question whether that approach may be appropriate in some cases. See *Pennell*, 2005 WL 1030123, at *6.

[7] A panel of the Ninth Circuit reached the same conclusion, but the court vacated that decision and is rehearing the case en banc. See *United States* v. *Ameline*, 400 F.3d 646 (9th Cir. 2005), vacated and reh'g en banc granted, 401 F.3d 1007 (9th Cir. 2005).

in virtually all cases in which a claim of constitutional sentencing error under *Booker* is raised for the first time on appeal.

The Third and Sixth Circuits have also concluded that even where there is no Sixth Amendment error, imposition of a sentence on the premise that the Guidelines are mandatory, rather than advisory, results in error that is presumptively prejudicial. See *Davis*, 2005 WL 976941, at *2; *United States* v. *Barnett*, 398 F.3d 516, 524-531 (6th Cir. 2005). The Sixth Circuit has held that the government can rebut the presumption of prejudice where "the trial record contains clear and specific evidence that the district court would not have, in any event, sentenced the defendant to a lower sentence under an advisory Guidelines regime." *Id.* at 529; see *United States* v. *Webb*, 403 F.3d 373, 382-383 (6th Cir. 2005) (presumption rebutted where defendant agreed to sentence in plea agreement and district court at sentencing considered upward departure and referred to defendant as a "menace").

In *United States* v. *White*, No. 04-4349, 2005 WL 949326 (Apr. 26, 2005), the Fourth Circuit adopted a different approach for cases in which the defendant claims that the district court erred in treating the Guidelines as mandatory, rather than advisory, but does not argue that the sentence violated his rights under the Sixth Amendment.[8] In those cases, the court held, the defendant must show that "the treatment of the guidelines as mandatory 'affect[ed] the district court's selection of the sentence imposed.'" *Id.* at *12 (quoting *Williams* v. *United States*, 503 U.S. 193, 203

[8] In *White*, although the district court increased the defendant's offense level under the Guidelines based on the court's finding that the defendant obstructed justice by committing perjury during his testimony at trial, the sentence the court imposed was within the range authorized by the jury's verdict. 2005 WL 949326, at *1.

(1992)). Thus, in cases involving only non-constitutional *Booker* error, the Fourth Circuit's plain-error analysis is similar to that applied by the First, Fifth, Eighth, and Eleventh Circuits to both types of *Booker* errors. See *White*, 2005 WL 949326, at *13 (citing *Antonakopoulos*).

The Tenth Circuit, sitting en banc, has held in a case where no Sixth Amendment violation occurred that the district court's "erroneous—although not constitutionally erroneous—mandatory application of the Guidelines is not particularly egregious or a miscarriage of justice," and therefore does not satisfy the fourth prong of the plain-error test. *Gonzalez-Huerta*, 403 F.3d at 738. The court noted that after *Booker*, courts must still "consider the Guidelines (*i.e.*, the national norm) when sentencing," and that the defendant "received a sentence that is within this national norm and the record is devoid of any mitigating evidence." *Ibid.* Since *Gonzalez-Huerta* was decided, panels of the Tenth Circuit have concluded, in cases involving both constitutional and non-constitutional *Booker* errors, that a defendant is entitled to relief on plain-error review if he can show "a reasonable probability that, under the specific facts of his case as analyzed under the sentencing factors of 18 U.S.C. § 3553(a), the district court judge would reasonably impose a sentence outside the Guidelines range." *United States* v. *Dazey*, 403 F.3d 1147, 1175 (10th Cir. 2005); see, *e.g.*, *United States* v. *Mozee*, No. 04-8015, 2005 WL 958498 (10th Cir. Apr. 27, 2005) (affirming sentence in case involving constitutional error, where district court sentenced defendant at top of Guidelines range); *United States* v. *Williams*, 403 F.3d 1188, 1199 (10th Cir. 2005) (remanding for resentencing in case involving only non-constitutional error, where sentencing judge stated that 210-month sentence required by Guidelines was "gross" and "immoral" and that if it were up to him, he

would give the defendant five years). In cases involving constitutional error, the court has held that a defendant can also show an effect on his substantial rights by showing "a reasonable probability that a jury applying a reasonable doubt standard would not have found the same material facts that a judge found by a preponderance of the evidence." *Dazey*, 403 F.3d at 1175.

3. The plain-error issue on which the courts of appeals disagree is largely a transitional one, because it involves the standard to be applied by appellate courts in reviewing a limited number of sentences imposed before *Booker*. The plain-error issue most frequently arises in cases currently on appeal in which sentence was imposed before this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), when sentencing courts treated the Guidelines as mandatory and defendants did not regularly object in the district court on Sixth Amendment or related grounds. This Court's decision in *Blakely* put many courts and defendants on notice of the potential for error. Accordingly, forfeited errors continued to occur, but with less frequency, in cases in which sentence was imposed after *Blakely* but before *Booker*. The plain-error issue should rarely or never arise in cases in which sentence was imposed after *Booker*, since district courts are now treating the Guidelines as advisory in accordance with that decision, and any treatment of them as mandatory would almost certainly elicit an objection.

Not only does the plain-error issue in this case affect a limited number of cases, but it also can be expected to be of steadily decreasing significance by the time this Court would be likely to decide this case, if further review were granted. By that time, many defendants with forfeited *Booker* claims will likely have been resentenced (especially in the Third, Fourth, and Sixth Circuits, which have

adopted relatively permissive plain-error standards for *Booker* cases). In other cases, it will be clear that a resentencing proceeding would not benefit a defendant (especially in the "limited remand" District of Columbia, Second, and Seventh Circuits, if the sentencing court indicates that it would have imposed the same sentence had it treated the Guidelines as advisory). Accordingly, if further review is granted, this Court's resolution of this case may directly affect only a limited number of sentences.

Despite the likely limited effect of a decision by this Court in this case, further review is warranted. There is a clear and deep multi-circuit conflict on the proper analysis of plain *Booker* error. With the exception of the Ninth Circuit, which is currently considering the issue en banc, each of the eleven other circuits with jurisdiction over criminal cases has taken a position on the issue. Those eleven circuits have adopted three different broad approaches, with further variations within each broad category. Some of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review, and they therefore have the potential to affect criminal cases not involving *Booker* error. The conflict in the circuits therefore warrants resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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